

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CLARENCE PHIPPEN,

Plaintiff

v.

**C.O. FISK; P.A. JANAN LOOMIS;
DONALD JONES; JOE NISH;
DEPARTMENT OF CORRECTION
PROGRAM REVIEW COMMITTEE;
RHONDA ELLETT, Unit Manager;
DEPARTMENT OF CORRECTION;
THE STATE OF PENNSYLVANIA;
and C.O. MCHUGH,**

Defendants

CIVIL NO. 3:09-CV-0795

Judge Rambo

Magistrate Judge Smyser

MEMORANDUM

Before the court is a report of the magistrate judge to whom this matter was referred in which he recommends that the certain counts of the amended complaint be dismissed. As to Defendant Loomis, the magistrate judge recommends dismissal of Counts 14, 15, 21, 29, 39, 46, 47, 56, and 61. As to the other Defendants, the magistrate judge recommends dismissal of Counts 1, 2, 3, 12, 13, 16 through 20, 22 through 28, 30 through 38, 40 through 45, 48 through 55, 57 through 60, 62 and 63. The magistrate judge further recommended that Plaintiff's request for a preliminary injunction be denied.

Plaintiff has filed objections to the report and recommendation. The first objection is to the finding of the magistrate judge that the state, its agencies, and its agents sued in their official capacities are immune from suit. Plaintiff alleges that the fact that counsel entered an appearance on behalf of the parties waives immunity. Plaintiff provides no law in support of this objection.

Plaintiff also takes issue with the finding by the magistrate judge that DC-ADM 801 violates *Wolff v. McDonnell*, 418 U.S. 539 (1974), with regard to allowing witnesses at disciplinary hearings and an impartial hearing examiner. The magistrate judge cited the pertinent parts of DC-ADM 801 and the pertinent parts of *Wolff* and found no violation of the holding in *Wolff*. Upon review, this court finds that the magistrate judge's conclusions are correct.

Plaintiff further alleges that even though some of his causes of action are grounded in violations of the criminal statutes, he has pleaded a cause of action. Plaintiff does not realize that the relief he requests requires criminal prosecution which he does not have standing to pursue.

The balance of Plaintiff's objections are disagreements with the report and recommendation which produce no new arguments not previously addressed by the magistrate judge in the report and recommendation. An appropriate order will be issued.

s/Sylvia H. Rambo
United States District Judge

Dated: October 6, 2010.

- 1) The court adopts the report and recommendation of Magistrate Judge Smyser.
- 2) The following counts as to Defendant Loomis are dismissed: Counts 14, 15, 21, 29, 39, 46, 47, 56, and 61.
- 3) The following counts are dismissed in their entirety: Counts 1, 2, 3, 12, 13, 16 through 20, 22 through 28, 30 through 38, 40 through 45, 48 through 55, 57 through 60, 62 and 63.
- 4) Plaintiff's request for a preliminary injunction is denied.

5) This case is remanded to Magistrate Judge Smyser for further proceedings.

s/Sylvia H. Rambo
United States District Judge

Dated: October 6, 2010.